
Supreme Court of New Jersey

DOCKET NO. 072323

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff - Respondent	:	
	:	On Leave to Appeal from the
	:	Superior Court of New Jersey
v.	:	
	:	Sat Below:
GIUSEPPE TEDESCO,	:	Hon. Anthony J. Parrillo, P.J.A.D.
Defendant - Appellant	:	Hon. Douglas Fasciale, J.A.D.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

DAVID J. WEAVER
SUSSEX COUNTY PROSECUTOR

GREGORY R. MUELLER
FIRST ASSISTANT SUSSEX COUNTY PROSECUTOR
SUSSEX COUNTY PROSECUTOR'S OFFICE
19-21 HIGH STREET
NEWTON, NEW JERSEY 07860
(973) 383-1570

OF COUNSEL AND ON THE BRIEF

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STATEMENT OF MATTER INVOLVED

The issue before the Court is whether a court must accept a defendant's request to waive his appearance at sentencing pursuant to R. 3:21-4(b), even though the plain language of rule does not confer an absolute right on the defendant to waive his appearance or require the court to accept such a request. Additionally, assuming the Court does have discretion to reject a defendant's waiver request, this Court will have to determine if Judge Conforti abused his discretion in compelling the defendant's appearance under the facts of this case.

The Court is considering this case largely as an issue of first impression. There are no New Jersey Supreme Court decisions or Appellate Division decisions addressing this precise question. However, there are two unreported Law Division decisions where the Court compelled a defendant's appearance at sentencing despite his request to waive same under R. 3:21-4(b) (State v. Charles Cullen and State v. Fred Neulander). Additionally, this Court has issued previously rulings that are instructive on the current question before the Court. For example, in State v. Dunne, 124 N.J. 303 (1991), the Court held that the existence of a constitutional right does not necessarily entitle a defendant to waive that right and dictate that a court proceed in the manner he requests. Additionally, the California Supreme Court held that a defendant was not

constitutionally entitled to absent himself from the penalty phase of his capital prosecution. People v. Frye, 18 Cal.4th 894 (1998). Moreover, there is federal precedent, cited below, that is instructive on the issue before the Court.

STATEMENT OF PROCEDURAL HISTORY

Sussex County Indictment No. 10-08-00289-I was filed on August 19, 2010 and charged defendant Giuseppe Tedesco with first degree murder, contrary to N.J.S.A. 2C:11-3a(1) and/or (2), second degree unlawful possession of a handgun, contrary to N.J.S.A. 2C:39-5b, and second degree possession of a handgun with the purpose to use it unlawfully against a person, contrary to N.J.S.A. 2C:39-4a. (Sa1).¹

On January 10, 2013, a jury convicted defendant on all counts of the Indictment. (Sa4). On January 11, 2013, the defendant was charged with third degree aggravated assault in violation of N.J.S.A. 2C:12-1b(5), third degree terroristic threats in violation of N.J.S.A. 2C:12-3a and a disorderly persons offense of obstructing the administration of law in violation of N.J.S.A. 2C:29-1. (Sa6). He was charged with these offenses for his conduct in the courtroom shortly after the jury announced its verdict. (Sa6; Sa8).

¹ Sa - refers to State's Appendix
Sb - refers to State Appellate Brief Dated March 15, 2013.

The Court scheduled defendant's sentencing for Wednesday, March 20, 2013. (Sa18; Sa50,51). On February 12, 2013, defendant filed a written request, pursuant to R. 3:21-4(b), to waive his right to be present at sentencing. (Sa22). Attached to his request, defense counsel submitted a certification signed by defendant dated February 18, 2013. (Sa23).

On February 25, 2013, the New Jersey Crime Victim's Law Center filed a motion to compel the defendant's presence at sentencing on behalf of the victim's mother. (Sa24).

On March 1, 2013, defense counsel filed a letter with the Court indicated he had reviewed the presentence report with the defendant and that he was prepared to detail his objection to same on behalf of the defendant. (Sa28).

On March 8, 2013, the State filed a letter with the Court formally joining the motion filed by the victim's mother to compel the defendant's presence at sentencing. (Sa29).

On March 13, 2013, a hearing was held before the Honorable N. Peter Conforti, J.S.C. on the motion to compel defendant's appearance at sentencing. (Sa30). After hearing argument, and placing his reasons on the record, Judge Conforti granted the application to compel defendant's attendance. (Sa49). Defense counsel moved for a stay of the decision pending an appeal to the Appellate Division. (Sa51). Judge Conforti denied the request for a stay. (Sa52). Judge Conforti entered a written

Order memorializing his decision from the March 13, 2013 hearing. (Sa56).

Thereafter, defendant filed an emergent motion with the Appellate Division for leave to file an interlocutory appeal of Judge Conforti's March 13, 2013 Order. (Sa57). On March 18, 2013, the Appellate Division granted defendant's application to hear the matter on an emergent basis and granted his application for leave to appeal. However, in a written decision, the Honorable Anthony J. Parillo, P.J.A.D. affirmed the decision of Judge Conforti to compel the defendant's presence at sentencing. (Sa62). Defendant moved for an Order staying the Appellate Division decision. (Sa67). On March 19, 2013, the Appellate Division denied defendant's request for a stay. (Sa69).

Thereafter, Defendant filed a motion with the New Jersey Supreme Court for leave to appeal the interlocutory order compelling defendant's appearance at sentencing and for a stay of the March 20, 2013 sentencing date. (Sa72). By Order dated March 19, 2013, the Supreme Court granted defendant's motion for leave to appeal and to stay the March 20, 2013 sentencing date. (Sa74).

STATEMENT OF FACTS

On March 27, 2010, Giuseppe Tedesco shot Alyssa Ruggieri six (6) times in the head, face, torso and hand with a .25 caliber Beretta handgun causing her death. (Sa1; Sb2). The victim was only twenty-two (22) years old when she was killed. (Sb2). Alyssa was murdered in her single family home, in Hopatcong Borough, where she lived with her parents. (Sb2).

At trial, the State's proofs demonstrated that the defendant drove to the victim's home with a handgun in his possession. (Sb2). He parked his vehicle two blocks away and entered her home through the front door. (Sb2). After fatally shooting the victim, the defendant left her lying in the foyer of her residence and went back to his home. (Sb2). In the process of killing the victim, the defendant accidentally shot himself in the hand. He later sought treatment at a nearby hospital. (Sb2).

During the trial, the defendant argued that he killed the victim in self-defense. (Sb3). During the defendant's testimony, he claimed that the first shot was fired accidentally into the victim's hand. (Sb4). He claimed that after the first shot, the defendant and victim then fell down the steps landing in the foyer. (Sb4). As they fell, the gun went off two more times. (Sb4). He claimed that he did not know how, or why, the gun went off because his eyes were closed at the time. (Sb4).

The defendant claimed that at the bottom of the foyer, the victim sat up and pointed the gun at him. (Sb4). It should be noted, however, that at this point the medical testimony demonstrated that the victim would have been paralyzed because she had been shot through her spinal cord. (Sb4). The defendant claimed that as the victim miraculously sat up and pointed the gun at him, he was able to grab the gun and turn it towards the victim. (Sb4). The defendant claimed that at this point, the victim pulled the trigger twice shooting herself in the chin and the nose. (Sb4). It should also be noted that the medical examiner testified that each of the five bullets to the victim's head and torso would have killed her almost instantly. (Sb3).

At trial, the state presented evidence regarding the defendant's motive for killing the victim. For example, the state presented evidence that the victim had recently started dating a man named Gerardo Leone. (Sb3). Additionally, the state presented evidence that prior to the murder the defendant stated that he could not live without the victim, and that he would kill her or any other man she was dating. (Sb3). The state also presented evidence that on two occasions, during the week before the murder, the defendant had slashed the victim's tires while she was visiting her new boyfriend. (Sb3). Moreover, the state presented evidence that the defendant created a fictitious Facebook page in order to communicate with the victim's new

boyfriend. (Sb3). Finally, the state presented evidence that moments before the murder, the victim sent the defendant a text message rejecting his invitation to get together on his birthday. (Sb3).

The jury returned guilty verdicts on all counts of the above referenced Indictment. (Sa4). As the Court was polling the jury, the defendant mouthed the words "fuck you" to each individual juror as they were polled. (Sa6). This conduct was observed by multiple law enforcement officers in attendance. After the polling, as the Court began to thank the jury for their service, the defendant turned to the victim's brother and shouted "Devon Ruggieri you're next motherfucker." (Sa11). After this outburst, the defendant was removed from the courtroom and brought to a holding cell. The defendant refused to comply with the Sheriff Officer's instructions and resisted their efforts to physically control him. A Sheriff's Officer broke his fibula bone during the fracas. (Sa7).

LEGAL ARGUMENT

POINT I

WHERE A DEFENDANT REQUESTS TO WAIVE HIS APPEARANCE AT SENTENCING PURSUANT TO R. 3:21-4(b), THE SENTENCING COURT RETAINS DISCRETION TO COMPEL HIS OR HER APPEARANCE BECAUSE THE DEFENDANT DOES NOT HAVE A UNILATERAL OR ABSOLUTE RIGHT TO ABSENTIA

On February 12, 2013, the defendant applied to the trial court to waive his presence at sentencing pursuant to R. 3:21-4(b). The trial court denied the request stating:

The Court alone has the inherent discretion and authority to control the various aspects of its proceedings ... including the power to accept or reject a defendant's waiver of appearance. (Sa42).

As a threshold matter, the State agrees that the trial court retains discretion to compel a defendant's appearance at sentencing notwithstanding a written waiver of appearance pursuant to R. 3:21-4(b). This conclusion, respectfully, seems apparent from the plain language of the Rule, and also from prior legal decisions concerning similar waiver requests.

R. 3:16 (b) provides, in relevant part:

The defendant shall be present at every stage of the trial, including ... the imposition of sentence, unless otherwise provided by Rule. Nothing in this Rule, however, shall prevent a defendant from waiving his right to be present at trial. A waiver may be found either from (a) the defendant's express written or oral waiver placed on the record, or (b) the defendant's conduct evidencing a knowing, voluntary and unjustified absence ...

R. 3:21-4(b) provides:

Presence of Defendant; Statement. Sentence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present. Before imposing sentence the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his or her attorney.

Importantly, from the plain language of R. 3:21-4(b), there is simply no language that requires a judge to accept a written waiver by a defendant, or that confers an absolute right on a defendant to waive his appearance. Rather, the Rule appears to be aimed solely at protecting a defendant's right to be present, and to participate, at his or her sentencing. In other words, although the language of R. 21-4(b) confers a defendant with the right to be present and participate at sentencing, the Rule does not confer the opposite right of absentia.

Even if, as suggested by defendant, the Court could supplement R. 3:21-4(b) with language requiring a trial court to accept a defendant's waiver request, or grant him the unilateral right of absentia, the state still submits a sentencing court would nonetheless have discretion pursuant to R. 1:1-2. This is so because R. 1:1-2 instructs that the Court Rules shall be interpreted to "secure a just determination, simplicity in procedure, fairness in administration and the elimination of

unjustifiable expense in delay." R. 1:1-2 also instructs that "any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice."

Reviewing the whole of the above cited Rules, the State respectfully submits that the language of the Court Rules vest discretion with the Court to accept, or reject, the defendant's waiver of appearance pursuant to R. 3:21-4(b). Beyond just the language of the Rules, however, there is established precedent further supporting the State's position.

Of course, sentencing responsibility and discretion rests with the trial court. Ball v. United States, 470 U.S. 856, 864, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). In exercising that discretion, courts have addressed waivers similar to the case at bar. For example, in State v. Dunne, 124 N.J. 303 (1991), the New Jersey Supreme Court addressed the question of whether a defendant had a right to waive a jury trial in favor of a bench trial. In Dunne, the defendant made a pretrial motion to waive his right to trial by jury and instead opt for a non-jury trial. This application was seemingly made for legitimate strategic reasons. Id. at 307. That motion, however, was denied by the trial court. Id. After his subsequent conviction, defendant appealed and argued, in part, that he was entitled to a bench trial as a matter of constitutional right. Id.

In addressing this question, the Supreme Court recognized the defendant enjoyed a constitutional right to a jury trial under federal and state constitution. Id. at 312. Of course, the Sixth Amendment to the United States constitution confers that right, as well as the due process clause of the Fifth and Fourteenth Amendments. Likewise, N.J.S.A. Const. Art. 1, Paragraph 10 provides, in relevant part: "[i]n all criminal prosecutions the accused shall have the right to a speedy trial by an impartial jury." While recognizing the existence of these rights, the Dunne Court held that the opposite was not true. Specifically, the Court found there was no "implied correlative right on the part of a defendant to demand trial by judge and not by jury." Id. at 312. The Court held "[t]he right to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite of that right." Id. at 314 citing United States v. Singer, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). The Court then provided examples to underscore this position. "For example, although able to waive the right to a public trial, a defendant cannot compel a private trial. Although able to waive the right to be confronted by witnesses, a defendant can never compel the government to try the case by stipulation." Id. The Court therefore held that a defendant "does not have a constitutional right to waive a jury trial and insist on a bench trial." Id. at 316.

In United States v. Moore, 466 F.2d 547 (3rd Cir. 1972), the Third Circuit also held that the Court's refusal to accept a defendant's request to waive his presence at trial did not violate his constitutional rights. Id. at 548. Similar to the defendant's argument in this case, the defendant in Moore argued that Rule 43 of the Federal Rules of Criminal Procedure² permitted him to expressly waive his appearance at trial. Id. In rejecting the defendant's argument, the Court found that the court rule was predominantly geared to ensuring defendant's presence at trial, not to permit defendant's absence. Id.

Likewise, in United States v. Fitzpatrick, 437 F.2d 19 (2nd Cir. 1970), the Second Circuit held that a defendant did not have a right under the rules of criminal procedure to absent himself from the courtroom during trial. Id. at 27. The Court stated that defendant's contention that he had a right to waive his appearance "finds no support either in Rule 43 or in the case law. Id.

Although New Jersey Appellate Courts have not ruled specifically on whether a Defendant has a right to absent

² Rule 43 F.R.Crim.P. provided, in relevant part: "The defendant shall be present at arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." Moore, 466 F.2d at 548, FN1.

himself from a sentencing hearing, other jurisdictions have addressed the issue. In People v. Frye, 18 Cal.4th 894 (1998), the California Supreme Court held that although a defendant had a right to be present at his penalty phase trial in a capital case, he did not have a constitutional right to absent himself. Id. at 1011. This was so even where the defendant had difficulty maintaining verbal control and was concerned he would have an angry outburst during the penalty phase. Id.

Similarly, in United States v. Turner, 532 F. Supp. 913 (N.D. Cal 1982), the District Court held there was no constitutional basis not to appear at sentencing. Id. at 916. In fact, the Turner Court found the common law has traditionally required a defendant's appearance at sentencing. More recently, the Third Circuit has echoed the need for securing a defendant's appearance at sentencing in United States v. Faulks, 201 F.3d 208 (3rd Cir. 2000). In reversing defendant's sentence because he wasn't present, the Faulks Court stated:

In our view, the notion that the sentencing court must "eyeball" the defendant at the instant it exercises its most important judicial responsibility [sentencing], whose daunting character has not been eliminated by the Sentencing Reform Act and the Sentencing Guidelines, is far from a formality. Rather, it is the embodiment of a value deeply embedded in our polity and our jurisprudence. Id. at 209.

As mentioned above, it does not appear that an appellate court in New Jersey has specifically addressed the question of whether a defendant has a unilateral right to waive his appearance at sentencing under R. 3:21-4(b), or whether a Court must accept such a waiver request. However, in at least two high profile murder cases, our trial courts have addressed this precise question. In the Somerset County case of State of New Jersey v. Charles Cullen, the Honorable Paul W. Armstrong, J.S.C. held that R. 3:21-4(b) did not confer on the defendant an automatic right to waive a his attendance at sentencing. (Sa92). In Cullen, Judge Armstrong compelled the defendant's appearance at sentencing notwithstanding his request to waive same under R. 3:21-4(b) and R. 3:16-1. (Sa95, Sa96). Similarly, in the Camden County case of State v. Rabbi Fred Neulander, the Honorable Linda G. Baxter, P.J.S.C. also compelled the defendant's appearance at sentencing despite his request to waive his appearance under R. 3:21-4(b). (Sa105).

In sum, the State respectfully submits that R. 3:21-4(b) does not grant a defendant a unilateral and absolute right to waive his appearance at sentencing. The State further submits that Judge Conforti has the discretion to accept, or reject, such an application under the Rule. And, for the reasons discussed below, Judge Conforti properly exercised his discretion in compelling defendant's appearance at sentencing.

POINT II

JUDGE CONFROTI DID NOT ABUSE HIS DISCRETION IN COMPELLING THE DEFENDANT'S APPEARANCE AT SENTENCING

There is little guidance on the factors a court should use when deciding to accept a defendant's waiver under R. 3:21-4(b) because this precise issue has never been the subject of appellate review in New Jersey.

In making his ruling, Judge Conforti cited several factors in support of his decision to compel the defendant's attendance at sentencing. Among the factors cited by the court were: (1) the harm inflicted on the surviving victims; (2) the victim's position regarding the defendant's presence; (3) the state's interest in compelling the defendant's appearance, including that of deterrence; (4) the value to the defendant of compelling his or her appearance and (5) whether there were case factors demonstrating a "compelling societal interest that demanded a defendant's appearance." (Sa42; Sa46). Judge Conforti found that such case factors would include crimes of notoriety and public consternation, "crimes of egregious acts of violence, crimes adversely affecting the institutions of government and crimes affecting a large population base." (Sa42).

In applying these factors, Judge Conforti stated:

This case with this violent magnitude, demands that Mr. Tedesco directly hear the opprobrium of the Court for his devastating actions. He must hear directly

the punishment of incarceration so that the victims and the community know that he has heard the Court's judgment. That the defendant should have to face those whose lives he has touched should be considered not only an avenue for the victim's personal healing, but also the first stage in the defendant's atonement for his wrongful acts. The face to face interaction between the Court and the defendant at sentencing is more than a mere formality. Rather, it is the culminating moment in which justice is delivered and society's confidence and the soundness of that judgment is evidenced. The Sixth Amendment right to a public trial not only protects a defendant's interest and legitimizes the proceedings by subjecting the Court's decisions to public scrutiny, but also ensures the continued faith and involvement of society in the criminal justice system. (Sa44 to Sa45).

The State submits the Court relied on appropriate factors in making its ruling. Each of these factors will be discussed more fully below.

Harm Inflicted on the Victim and Victim's Position on Issue

The New Jersey Constitution, state statutes and judicial decisions require that the rights of crime victim's be fully considered by a sentencing court. See N.J. Const. Art. 1, paragraph 22; N.J.S.A. 52:4B-34, et seq.; State v. Muhammad, 145 N.J. 23 (1996). In State in the Interest of K.P., 311 N.J. Super. 123 (Ch. Div. 1997), the Court stated:

The first substantive provision of the Victim's Rights Amendment provides that victims of crime "shall be treated with fairness, compassion and respect by the criminal justice system." N.J. Const. Art. 1, paragraph 22. ... Unfair practices that deny crime victims fairness, compassion and respect are unconstitutional under the amendment. Id. at 136-137.

In this case, Judge Conforti recognized that the victims viewed the defendant's waiver as "an unfair practice and abuse by the defendant which would deny her the dignity, compassion, and respect to which she is entitled under the Bill of Rights and the Victim's Rights Amendment." (Sa41). In this regard, the sentiments expressed by the victim's mother were appropriately weighed by Judge Conforti.

As part of her application to compel the defendant's appearance, the victim's mother wrote:

Facing Alyssa's loved ones is part of Tedesco's justice as it is the essence of our need and desire to obtain justice for Alyssa. As painful as it is to see Tedesco one more time, I know that Alyssa's loved ones must do this. Our victim impact statements will be meaningless if the individual who thrust us all into this terrible nightmare can simply turn his back to us and this Court and dismiss us as if we have no meaning in the process of justice. (Sa76, Sa77).

... I cannot describe the pain and anguish we have suffered but I do know that in every fiber of my being, I need him to be present to see and to hear about the pain that he caused to all of us. We need to say, and he needs to hear, that he can no longer control anyone or anything. He took my daughter's life when I was not there to protect her. We had to sit quietly and respectfully in court for the past three years as Tedesco was afforded justice. We could not say or do anything that might impact his right to receive justice. But now it is time for us to speak, and as painful as it will be for me and for other members of our family we will speak about how the joy of our life was violently snatched from us. And our child, all those who knew her and the process of justice demand that the evildoer who caused this unfathomable harm likewise be present. (Sa77).

The state submits that the harm inflicted on Alyssa's surviving victims and their corresponding need for the defendant's presence militate strongly in favor of compelling defendant's attendance at sentencing.

State's Interest in Compelling Defendant's Appearance

Judge Conforti correctly found that the State has an interest in compelling defendant's attendance at sentencing. (Sa45). That interest was articulated by the United States District Court in United States v. Turner, *supra*. In that case, the Court stated.

The state may have an interest in the presence of the defendant [at sentencing] in order that the example of personal admonition might deter others from similar crimes. Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done ... to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation of his conduct. The ceremonial rendering of judgment may also contribute to the individual deterrent force of the sentence if ... accompanied by appropriate judicial comment on defendant's crime. Turner, 532 F. Supp at 916.

Although it could be argued that the state would have such motivation in virtually all criminal cases, the facts of this case add more weight to this particular factor. The defendant in this case, frankly, has failed to show any remorse for his crime. He has largely blamed the victim for her own demise. At

the time of his verdict, he mouthed obscenities at the jury as they were polled. (Sa6). Immediately thereafter he threatened the life of the victim's brother. (Sa11). The State submits that the defendant should not be permitted to end his participation in this case with such blatant contempt for the court and the judicial process. The judicial process for the defendant should not stop with such a complete lack of compassion for the victims, or with such disregard for basic human decency. The State has a right to speak at sentencing and we believe our comments will have meaning not just for the court, the community and the victims - but also for the defendant.

Value to Defendant in Compelling His Appearance

The defendant's interest in attending his own sentencing was properly considered by Judge Conforti in his decision. (Sa47, Sa48). In analyzing this factor, Judge Conforti relied heavily on the Turner decision, *supra*. In Turner, the Court stated:

Presence is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decision maker be required to face him. Turner, 532 F. Supp at 916.

For Giuseppe Tedesco, the stakes at his upcoming sentencing could not be greater. For this defendant, the possibility of a life sentence in New Jersey State Prison is real. Given the magnitude of the potential sentence to be imposed, the Turner case discussed additional value to the defendant in mandating his attendance. The Turner Court stated:

... there is an additional and perhaps more fundamental justification for the right to be personally present. Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of life or how and to what extent it will deprive him of liberty. It shows a lack of fundamental respect for the dignity of a man to sentence him in absentia. Turner, 532 F. Supp. at 915.

In considering this particular factor, the state is mindful that the defendant has submitted a written waiver requesting to absent himself from the proceeding. However, the state questions the sufficiency of such a waiver. At this juncture, the defendant simply does not know what information will be presented to the sentencing court. He does not know how many victims will speak at the time of sentencing. He does not know the content of what they will say. He does not know how long the prosecutor will speak, or the content of her argument before the court. He does not know precisely which aggravating factors she will attempt to attach to the sentence, or which mitigating factors she will argue against. As a result, the defendant may

be unable to introduce evidence into the record to rebut the prosecutor's sentencing argument in support of aggravating and mitigating factors without being present. (See N.J.S.A. 2C:44-7 stating that an Appellate Court may modify a defendant's sentence where the record does not support the trial court's finding of aggravating and mitigating factors). Also, the defendant simply does not know, at this juncture, if there will be any supplementary information added to the presentence report on the eve of sentencing as is often the case. How would the defendant be able to address any late changes to the presentence report as required by Court Rule and statute. R. 3:21-2; N.J.S.A. 2C:44-7.

Without knowing any of this information, and given the magnitude of this particular sentencing, how could the defendant's waiver be knowing, voluntary or intelligent? Would a lawyer that permitted a waiver under such circumstances be found to be constitutionally deficient in the inevitable Post Conviction Relief application that would follow?

Additionally, it is unclear whether acceptance of a written waiver, as provided in this case, would suffice without the court addressing the defendant personally. See State v. Bey, 161 N.J. 233, 277 (1999) (the right of allocution should be addressed by the court with the defendant personally, not through counsel). See also State v. Morton, 155 N.J. 383, 441

(1998) (holding that in order to meet the requirement that the waiver of constitutional right is knowing, intelligent and voluntary - it is the judicial obligation to assure that the defendant understands the implication of his waiver. Consequently, trial courts should question defendants personally regarding the waiver of a constitutional right).

For all the above reasons, the state submits that in this case, the defendant has a fundamental interest in attending his sentencing. Considering the value to defendant in attending, this factor also weighs in favor of compelling his presence.

Societal Interest in Compelling Defendant's Appearance

Judge Conforti stated that "a court can and should evaluate whether there is a compelling societal interest that demands a defendant's appearance [at sentencing]." (Sa42). Judge Conforti found that the nature of the crime directly related to this societal interest. The Judge stated cases involving "public consternation and notoriety, crimes of egregious acts of violence, crimes adversely affecting the institutions of government [and] crimes affected a large population base" were cases impacted the societal interest that would militate in favor of requiring a defendant's appearance at sentencing. (Sa42).

In State v. Neulander, Docket No. 1993-06-00, the Honorable Linda G. Baxter likewise found this societal interest compelled Rabbi Fred Neulander attendance at his sentencing. Judge Baxter stated:

... I find that punishment begins not the moment that the defendant enters the cell door of whatever prison will ultimately hold him but I find that the proceeding here itself is the beginning of the sentencing phase and I find, therefore, that there is a valid societal purpose in having a defendant be present to hear the words of the State, to hear the words of the Court, and to hear the words of the victims ... and their right to do so, of course, is contained within our State Constitution but I find there is a valid societal interest in having a defendant hear those words. That is part of the punishment and it is part of the sentence. (Sa104).

Judge Baxter's "societal interest" reasoning in Neulander was cited by the Honorable Paul W. Armstrong, J.S.C. when he exercised his discretion in compelling the appearance of Charles Cullen to appear at sentencing. After quoting from Judge Baxter's decision, Judge Armstrong stated:

Principles of justice and sentencing compel the conclusion that Mr. Cullen should not be granted the opportunity to absent himself from the courtroom when his sentence is pronounced. Absent practical impediments, Mr. Cullen should be compelled to face the Court at sentencing and listen to the words of the Court and the loved ones of the victim whom he has so immeasurably and irreparably injured. (Sa95).

The State submits that this case calls for the same conclusion. This defendant committed an egregious act of

violence that took the life a twenty-two year old woman. Additionally, his violent acts not only irreparably harmed the lives of the victim's family and friends, but the impact from this horrible crime was felt throughout the entire community where this young woman lived. It is the extreme harm caused by the defendant's conduct that compels his attendance. See Payne v. Tennessee, 501 U.S. 808, 820, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (when a trial court exercises its discretion in connection with a sentencing proceeding, "consideration of the harm caused by the crime has been an important factor in the exercise of that discretion").

In short, the State respectfully submits that like the Cullen and Neulander cases, the societal interest in this case requires defendant's attendance at his sentencing.

Defendant's Sole Argument in Favor of Absentia

Against all of the above, the defendant weighs a singular argument in support of his request to dodge the sentencing hearing. The defendant claims that absentia is "the simplest and most practical way to address any concerns for the safety of the individuals present in the courtroom on the date of sentencing." (Sa45). The Court correctly recognized, however, that the defendant's own misconduct causes this to be an issue. (Sa46). "Of course, the defendant himself generated the

unfortunate confrontation on the day that the jury - jury announced it - announced its verdict." (Sa46).

Trial Courts have the ability to implement measures to ensure courtroom security. State v. Zhu, 165 N.J. 544 (2000). "[I]t is essential to the proper administration of justice that dignity, order and decorum be the hallmarks of all court proceedings in our country; that the flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." State v. Spivey, 122 N.J. Super. 249, 255-256 (App. Div. 1973), rev'd on other grounds 65 N.J. 21 (1974). A court has numerous tools at its disposal to control an unruly defendant, including the ability to "bind and gag" him. Illinois v. Allen, 397 U.S. 337, 343-344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353, 369 (1970).

In this case, the implementation of any measure to enhance courtroom security, such as an increase in security personnel, the use of restraints or even the use of a gag are less of a due process concern because the defendant no longer enjoys the presumption of innocence and there is no chance that a jury will be impacted by such measures. The proceeding at issue is a sentencing proceeding before a judge, not a trial before jury.

Applying the above referenced precedent, the Judge Conforti rightly stated:

The Court's power to conduct its proceedings determines that procedure a court must employ for an orderly proceeding to uphold the dignity of the court. An unruly defendant can be controlled physical including a gag ... to prevent a vocal disruption. What is paramount in these types of cases is the court's ... conducting a hearing consistent with proper decorum and the dignity and respect to which it is entitled. So, that all concerned and especially the defendant understand that the administration of justice prevail and not the narrow purposes of anyone individual. Thus, ample court security shall be in place throughout the courthouse for sentencing. And this Court has every confidence that with appropriate security measures this sentencing shall occur consistent with the Court Rules requiring defendant's appearance at sentencing. For any individual to attempt to challenge ... an orderly sentencing proceeding, these individuals shall be dealt with promptly by the Court according to law. (Sa46, Sa47).

Consequently, Judge Conforti found that "[w]hile it may very well be easy to allow defendant to remain in State Prison rather than transport him here to listen and possibly respond to the comments of the victims in the court, the policy consideration, the State's interest and the victim's interest all militate in favor of requiring defendant's appearance and outweigh any convenience derived from accepting defendant's waiver. He shall be required to appear." (Sa46).

The State submits that for all of the reasons cited above, the trial court properly exercised its discretion in rejecting defendant's waiver request and compelling his attendance at sentencing.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court affirm the decision of the trial and appellate court to compel the defendant's appearance at sentencing.

Respectfully submitted,
DAVID J. WEAVER
SUSSEX COUNTY PROSECUTOR

BY: 

Gregory R. Mueller
First Assistant Prosecutor

GREGORY R. MUELLER
FIRST ASSISTANT SUSSEX COUNTY PROSECUTOR

OF COUNSEL AND ON THE BRIEF

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